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Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,

Petitioner,

v.

NEW ALBANY DVD, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

NEW ALBANY DVD'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Preliminary Statement	1
Procedure	1
Facts	2
Reasons for Denying the Writ	20
Conclusion	30

TABLE OF AUTHORITIES

Page

CASES CITED:

Annex Books v. City of Indianapolis, 581 F.3d 460 (7th Cir. 2009) 2

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 25

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) ..... *passim*

McCreary County v. ACLU, 545 U.S. 844 (2005) 27

New Albany DVD, LLC v. New Albany, 581 F.3d 556 (7th Cir. 2009) ..... *passim*

Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997) 22

UNITED STATES CONSTITUTION CITED:

First Amendment 1, 26

RULES CITED:

Rule 16(b), Federal Rules of Civil Procedure 2

Rule 26(d), Federal Rules of Civil Procedure 2

Rule 26(f), Federal Rules of Civil Procedure 2

PRELIMINARY STATEMENT

Throughout this response, the Plaintiff-Appellee, New Albany DVD, LLC, will be referred to as "DVD." The Defendant-Appellant, City of New Albany, Indiana, will be referred to as the "City."

PROCEDURE

This case comes to the court in an unusual posture. DVD filed suit challenging the constitutionality of the City's moratorium on "adult" businesses and its refusal to inspect and issue the store a certificate of occupancy ("C.O."). Afterward, the City passed an adult entertainment code (it did not previously have one), which was also challenged under the First Amendment, i.e., the code did not pass muster under *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002).

Two evidentiary hearings were conducted, and Judge Barker granted a preliminary injunction. The City appealed Judge Barker's order to the Seventh Circuit Court of Appeals. After four years, the Seventh Circuit remanded the case to the District Court and ordered that an evidentiary hearing be held. The City then filed its petition with this Court.

In reading the City's petition one might conclude that this case has been subject to extensive discovery. "Even if, after six years of litigation, the city were to develop additional evidence . . . " City's Petition, page

29. However, *no discovery* has ever been conducted because the case was tolled based upon Judge Barker's decision not to enter a case management order – thereby prohibiting discovery. See Rules 16(b) and 26(d) and (f), Fed.R.Civ.P. The City's appeal was filed February 1, 2005. On October 26, 2009, as noted above, the Seventh Circuit reversed, finding that Judge Barker should hold an additional hearing consistent with its opinion and its opinion in *Annex Books*.[1] See *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009). Subsequently, *at the City's request*, Judge Barker stayed any further proceedings.

Considering the preliminary and limited nature of this record/case and the argument presented herein, this court should deny the City's petition.

FACTS

With all due respect, the City has omitted important facts and skewed others. The City may have truncated its factual recitation knowing that most cases, and resulting appellate opinions, are often fact-sensitive.

[1] *Annex Books v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009).

DVD – THE STORE

The City's brief gives the impression that DVD is located in the heart of a residential area across the street from a church. That is not an accurate characterization. The area can be more accurately described as motley-heavy commercial, if not industrial. The store is located on a two-lane highway known as Highway 111 or Main Street. This artery leads to a local gambling casino, known as Caesar's. Directly behind DVD is a garbage truck depot where garbage trucks are maintained and cleaned, and within eye-sight of DVD is a sewage treatment plant. Directly across the highway is a gasoline station with a convenience store which also sells sexually explicit magazines. A large box of sexually-themed materials (a great many titles) were purchased from that store and brought to the preliminary injunction hearing. Next to the convenience store is the church described in the City's petition.

Contrary to the City's representations, there are other (unregulated) stores in the City which sell large quantities of sexually explicit materials (thousands of titles) but this will be discussed in more detail below. For whatever reason, the City does not complain about these other video stores even though they have been in business for years.

Upon purchasing the property the DVD principals remodeled the building. It is approximately

2500 square feet and is aesthetically pleasing, if not somewhat austere in appearance.[2] The store sells books, magazines, and DVDs which contain articles, photographs, and cinematography which is sexually explicit, but non-obscene, in nature. The store does not provide on-site entertainment such as a movie theater, live entertainment, e.g., dancing, or booths of any kind to watch the movies on premises. In the words of the Seventh Circuit, "Customers buy books, magazines, or videos which they read or watch at home." *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009). Stated differently, DVD is purely a retail store.[3] Although clearly the genre of materials is distinct, it is the functional equivalent of the local "Blockbuster."

THE CITY'S CONDUCT AND FIRST EVIDENTIARY HEARING

Before purchasing the DVD property its principals hired a lawyer to confirm that the property could be used as a retail store. At that time, the City had no regulations addressing "adult entertainment" businesses. The architectural blueprints submitted to the City with DVD's business application bore the title

[2] Photographs and testimony were presented to the court supporting these points.

[3] In that respect, it is similar to the Internet, satellite television, or even hotels which make sexually-themed movies available for a fee.

"New Albany DVD, Retail." The City approved DVD's application and issued an improvement location permit ("ILP"). This document reflects that the use for the building was "commercial." With the application and review process complete, DVD was ready to open.

> Plaintiff bought land for this operation in 2003, secured all necessary licenses, and renovated the site's store to meet its requirements. The land was properly zoned for the business it proposed to operate.

New Albany DVD, LLC v. City of New Albany, 581 F.3d 556 (7th Cir. 2009).

At the time of the first evidentiary hearing, Eddie Hancock was New Albany's building commissioner. His predecessor, Mr. House, approved DVD's permit application. Applications are sent to the zoning department for review before permits are granted, and DVD's permit was issued December 29, 2003. The court questioned Mr. Hancock concerning the process.

> The Court: So something triggered that decision that zoning either decided that they didn't need to change or whatever, but something signaled your office – if the ordinary procedures were followed – to say everything's go on this issue, issue the permit, right? That's what the process looks like.

> Witness: I'm gonna [sic] agree with what you're saying because I wasn't there at the time.

Because Hancock was not the building official at the time, he was uncertain what happened to DVD's application other than it was approved and the City scheduled a final inspection.

> Counsel: We know that the city scheduled that inspection because they generated a form, they put it on their calendar, they used a pre-printed form and it was in the hopper to go out and inspect it, right?
>
> Witness: Yeah, it was – you're right, yeah.

Considering the issuance of the permit and the scheduled final inspection, Mr. Hancock's personal appearance at DVD's property on February 19, 2004 was questioned. He testified that he did not know why the City cancelled the inspection. However, at the special meeting held later that evening (the moratorium) the City attorney prepared a letter for Hancock's signature stating that DVD's building was "unsafe." Hancock had the letter delivered to DVD thereby preventing the store from opening. The letter did not explain what the problem was, it just said that the building was "unsafe." Judge Barker, who does not mince words, made it clear that she thought the City was engaging in questionable tactics.

The Court: Wait. Is there anything in that letter where you put this Mr. Johnson on notice that he's got a zoning problem?

Witness: No, no.

The Court: So you came up with unsafe property?[4]

Witness: That's my feeling, if it's not been inspected and accepted by the inspector; yes, ma'am.

* * *

The Court: Yeah, you snookered him, didn't you?

Witness: You think so?

The letter stated that because DVD's building was "unsafe," an administrative hearing was scheduled for March 9, 2004. The letter was a ruse and the hearing was never held.

Counsel: If it was truly an unsafe building there would have been a hearing on March 9 and there's never been a hearing. This closed and just disappeared.

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[4] The definition for "unsafe" building, per the City's code, has no application to DVD's property. It refers to hurricanes and how buildings can be physically unsafe causing injury.

Judge Barker questioned why the chief of police and high-ranking City officials converged on DVD if it had nothing to do with the "adult" nature of the business. Hancock said that he just rode down there because someone came into the City office and stated that a new business had opened in town. Mr. Hancock's testimony was circular and confusing – causing the court to backtrack and ask for clarification.

The Court: I thought you told me you didn't.

Witness: I didn't say I didn't. I just told – told you I rode down there. I didn't say what time I went down there.

The Court: I said around 2:00 o'clock and you said, oh, no, no, no.

At this point the fact that Mr. Hancock had visited DVD twice that day, once at 2:00 p.m. and again at 6:00 p.m., became clear. After all of the confusing testimony, the court questioned Hancock's candor.

The Court: Oh, are you telling me the truth today?

Witness: I wouldn't lie to you. Too old to start lying.

John Rosenbarger is the director of the City's planning commission. Although he had no personal involvement in DVD's application/opening, he testified

that a retail business must obtain an improvement location permit ("ILP") from the City prior to opening. However, he acknowledged that DVD in fact was issued an ILP.

> Q. So an ILP was issued to DVD; that's not in dispute?[5]
>
> A. Yes, this was issued by Gary House.

The comments made the evening during the "moratorium" hearing are enlightening as to the true motivations at work here. The record reveals this government activity had little, or nothing, to do with whether DVD's store might produce adverse secondary effects. Rather, certain members of the citizenry and the City hierarchy found the content of the materials sold by DVD to be offensive. New Albany's mayor stated, "so we will do everything we can to continue on our path to keep it closed."

> My mind's working already. Somebody needs to open up a daycare next to that place and we'll close it down right now, . . .
>
> * * *

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[5] The irony is that at Judge Barker's urging, DVD submitted another (second) application addressing zoning. In the City's response, filed with the court, it acknowledged that zoning did not prevent DVD from opening on February 19, 2004. Instead, the City's attempt to prevent DVD from operating was based upon the passage of its adult code – passed weeks *after* DVD's scheduled final inspection

> Every single law that pertains to building ought to be checked and double checked.
>
> * * *
>
> . . . [t]here's all kind of things to do . . . * * * . . . I want you to be devious.

The City's sexually oriented business code, Appendix E, App. 48-A, City's Petition, was created *after* DVD's application was approved and its lawsuit filed. In passing the code the City held several meetings but spent little effort addressing claims that stores such as DVD are linked to adverse secondary effects. Instead, the goal was to use any method possible to keep DVD closed. For instance, at the March 4, 2004 meeting, the City committee discussed the fact that oil tanks may be buried on DVD's property which may keep it closed.

> Mr. Coffey: Eddie, is there a way you can find out what – about the tanks – whether there's tanks there or – or do we have to go through EPA or what.

Committee Member Walter promoted using what she termed "legal harassment" to close DVD.

> Ms. Walter: We'll have to handle this one –
>
> Rev. Cheek: Right.
>
> Ms. Walter: – particular one. But I think that if you – if I can give you

some of my ideas about **legal harassment**,[6] we can –

Rev. Cheek: You certainly can.

Ms. Walter: (laughter)

Rev. Cheek: I have my eye on –

Ms. Walter: **We can try to run 'em out** – there he is. Hey, Danny, boy.

March 10, 2004, Afternoon Meeting.

The committee continued to come up with various schemes to keep DVD closed, including permit problems, the state fire marshal, the issue of alcohol (DVD does not sell or dispense alcohol), and the creation of what the committee termed "the porn police." The issue of an improperly erected fence was also discussed.

The committee also addressed a City-owned alley that exists on DVD's property and how that might keep DVD closed. Mr. Coffey stated that such an alley typically would have been vacated, but that he was thankful that normal procedures had not been followed.

Mr. Coffey: If you don't think God doesn't work, let me tell you something, normally, we vacate alleys.

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[6] All emphasis in this brief has been added unless otherwise noted.

Rev. Cheek: mmh-hmm.

Mr. Coffey: And for some reason, we held this one up. So, that was the good Lord's hand coming down on us.

March 10, 2004, Afternoon Meeting.

Throughout the meeting remarks were made concerning the presence of DVD's court reporter.

Mr. Coffey: I didn't know we were going to have company.

Court Reporter: I'm here just to simply get a record, that's all.

* * *

Mr. Coffey: I would not – I'm sorry. I'm not trying to be mean, but some people call it making a living, some people call it other things.

March 10, 2004, Afternoon Meeting.

Mr. Coffey: Let me ask you something, when you all have your meetings, are we allowed to come to them?

Court Reporter: I am not on anybody's side. I am simply an unbiased party.

Mr. Coffey: No, I'm just saying, they don't tell us when they have their meetings.

Court Reporter: If it's publicized, then, –

Mr. Coffey: This wasn't publicized. This wasn't a public meeting.

Court Reporter: They just –

Ms. Walter: What outfit is she with?

March 10, 2004, Afternoon Meeting.

* * *

Mr. Coffey: Well, I'll just be honest with you guys, be very careful what you say, you know, these people wouldn't grant us the same respect that we're granting them. They're using the same laws that govern people to be honest and decent for their own personal uses.

The comments reflect that these people simply did not want adult material in their community because of the content of the materials.

SECOND EVIDENTIARY HEARING

The second hearing in the District Court focused on whether retail stores that sell adult magazines and the like (merchandise to "take home") harm the community – "adverse secondary effects."

Dr. Daniel Linz

Dr. Linz, a professor at the University of California, Santa Barbara, was accepted as an expert on adverse secondary effects. Linz reviewed the record relied upon by the City in passing its ordinance. The City did not rely upon any study that dealt exclusively with "retail" establishments such as DVD.

Dr. Linz discussed the theories proposed by the City's expert. If the City's theory is that the content of the materials (tapes, magazines, etc.) cause harm, it would make no difference where they were reviewed – in one's home, a hotel, on the internet, etc. In other words, the "secondary effects" would not be linked to the distributor. Additionally, if this hypothesis held weight there would be evidence that these other sources, the Internet, cable television and satellite, caused the same harm.

On the other hand, if the City's theory is that bad things happen simply because people congregate at DVD's business location, this same theory would hold true at any business where people congregate – irrespective of the materials or services offered.

To bring this issue closer to home, the focus shifted to any adverse secondary effects linked to the *other* businesses that sold sexually explicit materials in New Albany – long before DVD came to town. Two stores in New Albany, specifically J&J Video and Movie Gallery, sell *large* volumes of sexually explicit videotapes.

J&J had *1876* sexually explicit videotapes and Movie Gallery had *2981* for sale or rent. Linz sought data from the City police addressing these two stores as well as two other non-adult video stores and a local non-adult bar. The following chart shows the police calls from January 1, 1999 to August 20, 2004. The column furthest right shows total calls excluding alarms triggered.

Monon Station (Non Adult, Alcoholic Beverage Establishment)	494	449
Hollywood Video (Non Adult)	157	92
Blockbuster (Non Adult Materials)	98	56
J&J Video (Adult Materials)	50	28
Movie Gallery (Adult Materials)	40	31

J&J Video is in a plaza with several other businesses which share a single address. Likewise, Movie Gallery shares its address with another business. The above figures include all police calls to the *collective addresses*, not the two stores in particular, thus presumably the police calls would be even lower.

There was no evidence in the City record (based upon local citizen testimony) that the City was concerned about pornographic "litter" associated with adult businesses. Dr. Linz concluded that the City's ordinance was invalid.

Dr. Richard McCleary

Dr. McCleary, the City's expert, testified that the City's ordinance was based upon a body of data that was transported into the ordinance. He conceded that there was no specific nexus between the imported data and the scope of the City's ordinance.

The court questioned McCleary about reliance upon studies that are twenty-five years old. "Is there ever a point at which the data gets old and stale and unuseable?" McCleary replied, "I would think not." He stated that criminologists rely upon studies which are 100 to 200 years old – but none of those studies involve "adult" businesses. In response to the court's questioning, McCleary stated that he did not believe there were any health consequences associated with retail adult stores.

McCleary described J&J Video as a small store, about 1200 square feet, with most of it devoted to mainstream videos. He did not think J&J was a fair comparison because it is a neighborhood video store that "[w]ould not fit into that theory of attractive hot spot." He also did not think Hollywood Video was a good comparison because it is a large store, approximately 8400 square feet.

Although McCleary conceded that the convenience store across the street from DVD sells sex-themed materials, he thought it should be treated differently because of the "[w]ay it sells it." He seemed to have difficulty addressing the court's concerns why this store did not cause adverse effects.

He opined that the convenience store does not attract the same type of customers as DVD.

As far as the church, the City's expert did **not** see that as a public safety issue. "The house of worship I do not see as largely a public safety issue, but I'm more troubled by the residential areas, distances to residences." He repeated this refrain in response to the court's question of whether the alleged criminal impact of DVD was lessened based upon the requirement that it be 1000 feet from a house of worship. "I would think that would **not** be a major public safety hazard." McCleary did not think there would be much of an impact on the church because worship on Sunday morning is very slow time for sexually-oriented business. "For that reason, public safety is not relevant."

The City's theory is that DVD attracts customers who are soft targets for predatory criminals. McCleary continued to repeat this theme, specifically that the **customers of** DVD are *not* criminals but instead they are the *victims* of crime. McCleary did not believe the DVD site could be patrolled properly by the police (to provide security for the patrons) because of the "L-shaped" fence. "[I]t hampers the ability of the police to economically maintain security in that block because when they drive by they can't see what's going on in that parking lot." He thought the fence should be removed. The issue of pornographic litter did not enter into his opinion. "[I]'m not saying anything about litter." He also was

not advancing the notion that viewing adult materials causes adverse secondary effects.

McCleary acknowledged the Fifth Circuit's observation concerning his "Garden Grove" study wherein it stated that the study "[n]eglected to indicate whether any of [the seven adult businesses studied] provided exclusively off-site entertainment." In fact, upon review of that study, there is nothing indicating it is devoted to retail establishments.[7] Although McCleary was opposed to Dr. Linz's police-calls analysis, he acknowledged that the Eleventh Circuit invalidated an ordinance based upon such calls.

While the court's questioning focused upon whether the ordinance had to be narrowly tailored when it targeted retail-only establishments, the City held to the claim that DVD's patrons would be prey for local criminals.

> Mr. Mason: I want to make sure I understand the composite of your argument. You're saying the store across the street, even if you go in there and buy 200 or 500 dollars worth of magazines, one magazine or forty magazines, you're saying that that store doesn't cause crime

[7] McCleary agreed that he previously testified that the Garden Grove study addressed on-site entertainment ("peep shows") versus pure retail.

> relating to the material because it doesn't have enough of the material; thus, it's not a magnet for people to travel long distances who are then vulnerable and victimized by the local people in the community?
>
> McCleary: I think I agree in principle with that statement.

According to McCleary, DVD's patrons will fall prey to the predators in New Albany (the local community) because the patrons want to remain anonymous, they travel long distances and carry cash to purchase movies and magazines from DVD. Judge Easterbrook dismissed this paternalistic argument. The police must protect the readers from the hecklers and thieves, rather than ease their workload by forbidding the speech. *New Albany DVD, LLC v. New Albany,* 581 F.3d at 560. McCleary had difficulty explaining why DVD's business is different from someone purchasing a video from satellite television or why patrons would not have to disclose their identity when using their credit card to rent a video from a local adult store.

He agreed that the City's 30% threshold (numbers of adult videos[8] necessary to trigger the adult restrictions) is an unreliable factor if the City is

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[8] See definitions of "adult bookstore" and "significant and substantial," City's Appendix E, pp 54a and 57a.

trying to reduce secondary effects. The court questioned the City's hypothesis that a line can be drawn establishing what percentage of adult videos triggers secondary effects.

The thrust of McCleary's argument was that it was the commercial activity associated with DVD which caused the secondary effects, not DVD's customers or the content or type of materials sold.[9]

REASONS FOR DENYING WRIT

INTRODUCTION

The City's brief and the briefs of amici express distress over the fact that the City must produce credible evidence to support its hypothesis that DVD harms the community, i.e., causes adverse secondary effects. Considering that DVD has been operating under an injunction for over five years, the City should welcome the opportunity to now show that DVD is a "bad" business. Some might consider this to be the perfect experiment.

The problem is that there is no evidence, not even shoddy evidence, that DVD is linked to adverse

[9] Following this analysis to its logical end would lead the reader to conclude that all businesses with a large number of patrons (any commercial activity) would cause adverse secondary effects – which obviously has nothing to do with sexually-themed businesses.

effects. Clearly the Seventh Circuit was intrigued by this because the court specifically stated that DVD has been operating under an injunction and, therefore, if there is evidence, it will be easily proved on remand. *New Albany DVD, LLC v. City of New Albany*, 581 F.3d at 561.

This is the crux of the matter. These attorneys and the City are aware of DVD's place in the community subsequent to the 2005 injunction is known. DVD has improved the neighborhood and is one of the nicest buildings for blocks.[10] Not one complaint of litter, much less "smutty litter" (Judge Easterbrook's term), has been made. No crime has been linked to DVD. Since October, 2005 the police have been called to the business seventeen times. None of the calls are linked to bad behavior traced to the business. For instance, one of the calls involved the theft of the copper from DVD's air conditioning unit, some were for false burglar alarms, one was to report an insufficient-funds check, and another involved the theft of a four dollar piece of merchandise from the clerk's counter, etc. In comparison, the convenience store across the street from DVD had 131 police calls and another "Circle K" in New Albany had 114. In addition, DVD has data concerning a

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[10] The City offered no evidence that DVD or retail stores lower property values or cause dilapidation. In fact, it was noted during one or more of the City's meetings that the DVD property would positively impact local property and values.

number of other business/police comparisons in New Albany since the 2005 injunction.

The doctrine of adverse secondary effects is not a charade that can be used to restrict or close a business because the government finds it politically or morally offensive. Presumably, every Justice[11] of this court believes that facts and truth are the touchstone of the equation. If the facts were not the backdrop of review, then intellectual honesty would go out the window.

ALAMEDA BOOKS AND CITY'S CONFLICT ARGUMENT

Upon reading the City's petition and the briefs of amici, one would think that the proverbial sky is falling. For obvious reasons, these papers are emotionally charged. The argument that the Seventh Circuit has deviated from this court's jurisprudence is far off the mark.

Eight years ago this court issued its opinion in *Alameda Books*.[12] A fair review of that opinion reveals that the Seventh Circuit, especially considering the record in this case, followed the lead of this court. In

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[11] Justice Alito (then judge) and the Third Circuit in a pre-*Alameda Books* opinion addressed this issue in *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3rd Cir. 1997).

[12] *City of Los Angeles v. Alameda Books*, 535 US 425 (2002).

fact, a close reading of *Alameda Books* demonstrates that the City has no basis for complaint here.

Justice O'Connor, Chief Justice Rehnquist and Justice Thomas

The *Alameda* plurality opinion was authored by Justice O'Connor and joined by justices Rehnquist and Thomas without opinion. The singular question presented was whether the local study conducted by Los Angeles constituted sufficient evidence to place a material fact in issue, i.e., the claim of adverse secondary effects, thus moving the case toward trial. The plurality found that it was. In so doing, it noted that the case was at a very early stage in the process (summary judgment) and that the plaintiff-adult business, bookstore combined with an arcade, did *not* offer a competing theory challenging the City's 1977 study nor data addressing elevated crime rates in neighborhoods with a concentration of adult businesses in Los Angeles. See *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 437-438.

The plurality's language indicates that this court permits (if not encourages) "adult" litigants to offer independent evidence either challenging the City's propositions or supporting their own. This statement can be traced to the following language. "In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rate in neighborhoods with a concentration of adult businesses . . . " *Id.*, 535 U.S. at 437. There is also the

oft-quoted statement that the City cannot rely upon shoddy data or reasoning, and that its rationale is subject to challenge "[b]y demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings . . . " *Id.*, 535 U.S. at 438. The plurality determined that the case should proceed past summary judgment because the City's local study supported its theory that a concentration of adult businesses[13] caused adverse secondary effects.

The statement at 535 U.S. 440 is of special interest here. There, Justice O'Connor wrote that Los Angeles did not have a treatment group (an experiment, if you will) allowing a comparison between adult video arcades as opposed to multiple use businesses, specifically bookstores and arcades. Therefore, Los Angeles could not be faulted for not having an opportunity to address whether those singular businesses (arcades) cause secondary effects. Considering this, how can New Albany complain of the Seventh Circuit's opinion? There is a specific treatment group – the perfect experiment, specifically a business which has been in business for over five years in which to conduct its secondary effects analysis. The problem (from the City's perspective) is that it knows what the evidence reveals and it wishes to ignore it.

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[13] Which, per Justice O'Connor, by definition would include multiple businesses under the same roof.

The *Alameda Books* plurality opinion was premised upon the requirement that the City produce evidence establishing that adult establishments produce a greater amount of criminal activity than non-adult establishments. If this were not the case, Justice O'Connor would not have noted this at 535 U.S. 436 in writing "[p]roduce greater[14] levels of criminal activity . . . " In other words, Justice O'Connor was addressing the issue of whether adult businesses do, in fact, generate greater levels of adverse effects than other enterprises. But here, there are several businesses in the City of New Albany that not only sell sex-themed materials but sell them in large quantities. Judge Barker heard two days of evidence, including evidence that businesses which sell "adult materials" in New Albany generate far less criminal activity than their non-adult counterparts. It is enlightening that the City refused to challenge and offer any evidence disputing DVD's local data. From a visceral standpoint it is understandable why the City complains about this evidence, but its legal objections run contra to this court's precedent.

Justice Scalia

Justice Scalia in his concurrence reaffirmed two points. First, he was not abandoning *stare decisis*. "I

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[14] Even in a non-First Amendment setting this court has stated that comparables should be reviewed to determine if there exists a fair or disproportionate impact. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1985).

join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the 'secondary effects . . . '" *City of Los Angeles v. Alameda Books*, 535 U.S. at 443. He followed up by noting his prior position that the First Amendment does not prevent communities from suppressing businesses which pander sex. Yet this is a far cry from stating that Justice Scalia would champion overruling decades of law that provides First Amendment protection to provocative entertainment and materials, including sex-themed books and magazines.

Justice Kennedy

It has been stated many times that Justice Kennedy's concurrence is the glue that binds the *Alameda Books* opinion together and is considered the court's holding.

He begins by noting that "speech" can cause secondary effects, . . . *Id.*, 535 U.S. at 445. Is that premise satisfied here? The City's expert testified that it was not the speech – the content of the materials sold at DVD – that caused crime. Rather the City's theory is that New Albany's citizens are the criminals who "prey" on DVD's customers. Without characterizing the nature of that hypothesis, by this very statement it's not DVD or the "speech" that it offers that (purportedly) causes adverse secondary effects – it is the citizens of New Albany themselves.

Justice Kennedy continues by noting that the "material" inside an adult movie theater or adult bookstore constitutes speech but "[t]he consequent sordidness outside is not . . . " *Id.*, 535 U.S. at 445. Considering this statement, presumably Justice Kennedy would not support an ordinance that is based upon an unsound evidentiary foundation or disproved through credible evidence.

That leads us to Justice Kennedy's statement that an ordinance directed at the secondary effects of "adult speech" does not (necessarily) constitute impermissible content discrimination. *Id.*, 535 U.S. at 447-448. Would this hold true if the record established that the City's motivation was to actually suppress speech because of its emotional upset over the nature of the business and no credible evidence supported its secondary effects hypothesis? That is the debate the Seventh Circuit reviewed. Here, the Seventh Circuit merely remanded the case for an additional evidentiary hearing to focus upon the nature and strength of the City's secondary effects claims and to determine if a *preliminary*[15] injunction should issue.

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[15] Preliminary injunctions are exactly that, preliminary in nature. They involve a balancing of factors with the backdrop being factual review and independent analysis of the law. Ultimately, the issue is a question of discretion and whether that discretion has been abused. *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005).

Justice Kennedy reiterates his point at 535 U.S. 452 where he discusses the theory underlying Los Angeles's 1977 study. "Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters and the crime rate may increase as a result." Here, the City's highly-paid expert testified to a completely contrary proposition – specifically that it is not DVD's customers that are unsavory but rather the locals who prey upon them. Considering this, how can the Seventh Circuit be faulted for stating that the City, through its police force, should control its own citizenry?

Justice Kennedy reiterates that the City's assumptions are subject to direct evidentiary challenge and can be invalidated. "If these assumptions can be *proved unsound at trial*, then the ordinance might not withstand intermediate scrutiny." *Id.*, 535 U.S. at 453. That is the purpose underlying the Seventh Circuit's remand. The Seventh Circuit, like this court in *Alameda Books*, reviewed the record evidence and determined that an additional evidentiary hearing should be held.

Justice Souter joined by Justices Stevens, Ginsburg and Breyer[16]

Justice Souter joins the discussion by highlighting that there is a "high risk" that restrictions

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[16] Justice Breyer joined part II of Justice Souter's opinion.

may be imposed on provocative speech which is disagreeable to government. 535 U.S. at 455. In those cases, strict scrutiny applies and leaves "few survivors."

Justice Souter's (and the dissenters') dispute with the plurality focused upon the evidentiary value of Los Angeles's 1977 study. "Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the court's judgment today." 535 U.S. at 454. In other words, *Alameda Books*, like most cases, was a fact-driven opinion. DVD is likewise fact-driven. Obviously different courts will reach different conclusions based upon differing factual records – that is the fundamental nature of litigation and the court system. That is a core reason why this court should deny review.

In terms of this case the statements that appear at footnote five, page 462 in Justice Souter's *Alameda Books* opinion are especially interesting. He states that the question is open whether a City can rely upon the experiences of other cities when those experiences are contradicted by its own studies. These attorneys respectfully suggest that is what the plurality touched upon when it referenced the business's ability to challenge the City's hypothesis and present data of its own. Here, the City's evidence was challenged, debunked, and overtaken by evidence from the local community. This is distinct from the fact that the City was unable to present any evidence establishing that retail venues selling sex-themed

materials cause adverse secondary effects. DVD simply drove the point home with local data.

CONCLUSION

Through its remand, the Seventh Circuit has actually given the City a second bite at the apple. It is therefore surprising that the City appealed the Seventh Circuit's ruling. This case rides on its own facts, but it is not unique in terms of the law. The Seventh Circuit followed this court's guideposts and it should not be faulted for doing so.

Accordingly, the City's petition for certiorari should be denied.

Respectfully submitted this 13th day of May, 2010.

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